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October 20, 1995

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William F. Caton
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Errata and Filing of Corrected Copy in
GEN Docket No. 90-357
IB Docket No. 95-91 ✓

Dear Mr. Caton:

The National Association of Broadcasters hereby files an errata and a corrected copy of its recently-filed rulemaking reply comments in the above-referenced dockets. NAB's Reply Comments that were filed with the Commission on October 13, 1995 contained several typographical and formatting errors and errant notations that had been changed, but due to a computer error, were printed in the final copy. Aside from these clerical errors, the only change that had been made but not printed in the final version was the addition of citations to footnote 128, which have been re-added to the corrected copy filed today.

We hereby file a corrected copy of the NAB's Reply Comments.

Sincerely,

A handwritten signature in black ink, which appears to read "Valerie Schulte", is written over a horizontal line. Below the signature, the name "Valerie Schulte" is printed in a standard font.

Valerie Schulte

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Establishment of Rules and Policies
for the Digital Audio Radio Satellite
Service in the 2310-2360 MHz
Frequency Band

)
) IB Docket No. 95-91
) GEN Docket No. 90-357
) MMF No. 8610
) PP-34
) PP-85
) PP-87

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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BROADCASTERS**

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October 13, 1995

TABLE OF CONTENTS

I. DARS <i>WILL</i> RESULT IN A NET LOSS FOR THE PUBLIC, PARTICULARLY FOR SMALLER MARKETS AND FOR MINORITY AND SPANISH-LANGUAGE POPULATIONS	2
A. Despite Its Promise, Dars Will Bring Little Public Benefits.	2
1. DARS "Promise" of Foreign Language Channels: Pie In the Sky	3
2. DARS Proponents Underepresent and Misrepresent Radio's Reach: The Reality Is Extensive Coverage.....	6
3. DARS Will Not Bring Much Lasting Benefit In Terms of Jobs or U.S. Competitiveness, But Will Precipitate Significant Job Losses In Local Radio.....	8
B. Dars <i>Will</i> Impact The Financial Abilities Of Broadcasters To Provide Local Service, Particularly To The Smaller Markets And To Minority, Niche And Foreign Language Audiences.	10
1. The Commission Can and Should Consider the Impact Of DARS On Traditional Radio, On Localism and On the Public Interest.	11
2. Local Radio Is Highly Competitive and Localism and Local Radio Have In Fact Suffered From the Effects of Docket 80-90.	12
3. DARS Proponents Falsely Present and Analyze the Radio Industry As a FM-Only Well-Heeled Monolith.....	14
4. DARS Clearly <i>Will</i> Present Competition For Local Radio's Audience and Advertising.	19
5. DARS Proponents' Revenue Impact Assertions and Analyses Are Flawed.	23
6. DARS <i>Will</i> Severely Impact the Financial Abilities of Broadcasters To Provide Local Service, Particularly in the Smaller Markets and Particularly For Niche and Spanish-Language Broadcasters.....	30
7. Even Small Percentages of Audience Diverted to DARS from Local Radio Will Severely Impact Small Market Broadcasters.	31
C. DARS <i>Will</i> Diminish Localism and Reduce the Amount and Quality of Local Service Provided by Radio Everywhere.	32

II. GIVEN THE ENORMOUS POTENTIAL NET LOSS TO THE PUBLIC INTEREST, SATELLITE DARS SERVICE RULES SHOULD BE DESIGNED TO MINIMIZE THE HARM TO BROADCASTERS AND LOCAL PUBLIC SERVICE.....	34
A. The Commission Should Make Satellite DARS A Subscription-Only Service	34
B. The Commission Should Make Satellite DARS Licensees Deliver on Their Promises to Serve Underserved, Ethnic and Niche Populations	36
III. THE COMMISSION SHOULD OPEN THE SATELLITE DARS SPECTRUM TO ALL COMERS	39
A. There Is No Legal Or Public Policy Basis For Affording Cut-Off Protection To Current Satellite DARS Applicants.....	40
B. The Commission Should Reject The Satellite Dars' Applicants Self-Serving Channel Plan.....	47
1. The Current Applicants' Proposed Channel Plan Attempts to "Lock Up" the DARS Spectrum for Their Exclusive Use, and Contravenes Both Their Applications and Their True Spectrum Needs	47
2. The Proposed Satellite DARS Channel Plan is not Spectrally Efficient.....	51
3. The Proposed Channel Plan is Not in the Public Interest, and is Designed to Entrench the Current Applicants and to Exclude the Possibility of the New Applicants.....	52

SUMMARY

The National Association of Broadcasters replies to the DARS proponents and the organizations which have filed in support of the “promise” of satellite DARS with NAB’s view of the DARS reality the marketplace surely will bring. NAB maintains that DARS *will* result in a net loss for the for the public, particularly for smaller markets and for minority and Spanish-language populations. First, NAB shows that, despite its promise, DARS will bring little public benefits. We maintain that DARS “promise” as to multiple foreign language channels is simply “pie-in-the-sky.” NAB questions, on the basis of marketplace realities and on the basis of DARS’ proponents proffered format offerings, *how many niche and foreign language program choices will actually be offered*. An examination of the only proponents’ suggested formats available reveals that *only one foreign language program offering, that of Spanish*, which is already widely available, in *local* form, terrestrially. There simply will be no Italian DARS channel, no Vietnamese DARS channel, no Arab DARS channel, no Chinese DARS channel. Individual broadcasters’ comments suggest that DARS operators, given the unrestrained choice to program as the marketplace and their financial interests dictate, *will* opt for the more popular (and most remunerative) formats.

Second, DARS proponents underrepresent and misrepresent radio’s reach — the reality is extensive coverage. Three of the DARS proponents, in their comments, blatantly misrepresent the reach of terrestrial radio by referencing *only* the reach of FM radio signals, *completely ignoring the entire AM radio industry as though it did not exist*, when in fact AM radio has been the backbone of small market and *local* radio for over 70 years and represents nearly one-half of all commercial radio stations.

When one looks at the whole picture of radio service in the United States, not just at a selected portion of the radio industry as the DARS applicants have self-servingly done, it becomes clear that there is wide diversity, great numbers of *local* community-connected and people-connected radio stations in even the smaller markets that the "promise" of DARS somehow misses. DARS will add something to many radio markets. But not as much as the applicants would have the Commission (or many of the commenters) believe. The American people are well served by traditional radio, in the large markets, and importantly, in the small and medium markets that DARS "promises" to serve but will, in the long run, homogenize and strip of its connectedness and its sense of "community."

Third, NAB maintains that DARS will not bring much lasting benefit in terms of jobs or U.S. competitiveness, but will precipitate significant job losses in local radio. The satellite technology being employed by the DARS applicants is in fact not "new" technology that would increase U.S. competitiveness, but rather standard, run-of-the-mill decade-old satellite transmission technology. Moreover, U.S. technology will remain competitive to the extent that it is superior and cost-efficient for all users and buyers, not to the extent that U.S. companies employ it. The U.S. will remain a world leader in satellite design and construction and in IC design and development, irrespective of whether DARS ever builds a satellite or uses chips. What will in fact increase U.S. competitiveness is the new ground-breaking IBOC technology being developed by and for U.S. broadcasters, which the world will follow. DARS will effect a net *loss* in U.S. jobs, and, even on its own, will not create much in term of long term employment.

NAB demonstrates that DARS *will* impact the financial abilities of broadcasters to provide local service, particularly in the smaller markets and to minority, niche and foreign language audiences. One, the Commission can and should consider the impact of DARS on traditional radio, on localism and on the public interest. Two, local radio is highly competitive and localism and local radio have in fact suffered from the effects of Docket 80-90. Three, DARS proponents falsely present and analyze the radio industry as a FM-only well-heeled monolith. Four, DARS clearly will present competition for local radio's audience and advertising.

Five, DARS proponents' revenue impact assertions and analyzes are flawed. The contention that local radio won't be hurt because DARS can't compete with radio's local content and information is wrong. So too are the proponents arguments as to the impact of CD's, cassettes, cable audio and DBS. CD Radio's InContext study is flawed in significant respects and NAB attaches an appendix demonstrating how it is flawed. NAB demonstrates that AMRC's and Primosphere's MTA-EMCI revenue impact study is based on faulty assumptions and must be completely discounted. Significantly, MTA applies its analysis *only to FM stations and only to FM stations in rated (and therefore not the smallest) markets*. The nearly one-half of all commercial radio stations (AM) which are the most financially vulnerable are simply not included in the MTA analysis. NAB demonstrates other significant problems with the MTA Study.

Six, NAB points to the comments of specific broadcasters who assert that DARS will severely impact local service in the smaller markets and that provided by niche, minority and Spanish-language broadcasters. Seven, NAB submits an additional analysis by Miller, Kaplan, Arase & Co. of the impact on small market revenues using lower than estimated audience diversion figures. The results show that there would be severe negative impacts on many of the stations in the small markets examined.

In its initial Comments, the NAB urged the Commission to adopt a service design that will minimize the potentially devastating impact that the introduction of satellite DARS could have on terrestrial broadcasters, and in particular, on these broadcasters' continued ability to provide locally produced, community oriented programming. The NAB herein reiterates the need for the Commission to ensure that satellite DARS develops as a service that truly is complementary with and not destructive to local terrestrial broadcasting and the invaluable public service benefits it provides. Specific measures the Commission should take in this regard included implementing satellite DARS as a subscription-only service, and ensuring that satellite DARS providers deliver on their promise of serving underserved ethnic and niche markets, which has been the primary justification for the service to date.

In addition, the NAB reiterates its call for the Commission to open the satellite DARS spectrum to all comers. Notwithstanding the fact that the new technology landscape has changed dramatically in the time since they submitted their applications, and that there are other potential applicants that are ready, willing and able to offer their own competitive uses for the satellite DARS spectrum, these parties invoke legal fictions, illusory "equities," and shifting

capacity requirements to argue that the Commission should (1) insulate them from competing applicants -- regardless of whether new applicants might use the spectrum more efficiently; and (2) allow them to divide the spoils of a 50 MHz spectrum windfall among themselves -- regardless of their stated spectrum needs. In opening up the spectrum, the Commission should adopt the channel plan proposed in the NAB's initial submission, which allows for the creation of multiple satellite DARS licenses, serves the needs of both the current and future applicants, and most importantly, is not simply a function of dividing the all available frequency bandwidth by four in a manner wholly unrelated to actual satellite DARS spectrum requirements.

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In the Matter of

**Establishment of Rules and Policies
for the Digital Audio Radio Satellite
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Frequency Band**

)
) **IB Docket No. 95-91**
) **GEN Docket No. 90-357**
) **RM No. 8610**
) **PP-24**
) **PP-86**
) **PP-87**

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The FCC has solicited comments on its Notice of Proposed Rule Making¹ to authorize and set rules for a satellite radio service, commonly known as DARS. It has received comments from DARS applicants and others in support of the service, from broadcasters in opposition to DARS and from other parties who advocate specific conditions of access and programming obligations.

The National Association of Broadcasters² hereby files reply comments, which rely in the main on our initial comments and those of local broadcasters in testament to our points and in rebuttal of those presented by the DARS applicants and supporters. We particularly respond to those organizations which have filed in support of the "promise" of satellite DARS with our view of the DARS reality the marketplace surely will bring.

¹ Notice of Proposed Rulemaking, IB Docket 95-91, Gen. Docket 90-357, 60 Fed. Reg. 35166 (July 6, 1995) ("Notice").

² NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks.

I. DARS Will Result in a Net Loss For the Public, Particularly for Smaller Markets and For Minority and Spanish-Language Populations.

NAB demonstrated in its initial comments that, as proposed, DARS will bring only minimal new benefits to the vast majority of the listening public, but will, with its certain duplication of mainstream formats and its sure diversion of audiences and fragmentation of advertising, lessen the ability of traditional radio stations everywhere to provide quality local programming and community services. NAB demonstrated that this impact will be greatest, ironically, in the smaller markets and on *local* niche, minority and spanish-language radio stations in all markets. We here respond to arguments to the contrary made by the DARS proponents, for the benefit of the Commission and, as well, for those who filed in support of the “promise” of DARS.

A. Despite Its Promise, DARS Will Bring Little Public Benefits.

The “promise” of DARS, indeed the very reason for the Commission to devote spectrum to a DARS service, is to provide niche and specialized programming, particularly in foreign languages, for dispersed audiences and to provide diversity of programming for “underserved” populations.³ NAB in its initial comments questioned whether DARS operators will in fact provide much in the way of niche, specialized or foreign language programming. We demonstrated as well that there is wide diversity of “mainstream” formats receivable in all but the smallest markets, where there are still healthy numbers of signals and

³ Notice at ¶ 2. The Notice also points to, as a reason for DARS, service to areas with “few or no” terrestrial radio broadcasts. NAB, in its initial comments, demonstrated that the Notice was mistaken that there are areas that receive “few or no” terrestrial radio broadcasts, except of course for areas with *very few* people, save the occasional travelers. As was pointed out there, *only 6100 people aged 12 and older, out of 210 million the entire country, live in counties that receive less than 6 radio stations.* NAB Comments in Gen. Docket No. 90-357, filed September 15, 1995 at 17-18.

formats receivable (and many small markets with substantial numbers of stations receivable).

NAB here responds to the claims of some DARS proponents to the contrary, and to the “hopes” of many pro-DARS commenters.

1. DARS “Promise” of Foreign Language Channels: Pie In the Sky

Over and over one reads in the comments of DARS applicants and in the comments of many groups who believe that “their” foreign language or “their” specialized niche will be served by DARS that DARS “can” or “permits” or “is able” or “has the potential” to provide niche, specialized and foreign language programming.⁴ NAB emphasizes the “can” and the “promise” (theoretical not actual) of DARS in this regard, rather than the “will.” For, as NAB said in initial comments, we *question*, on the basis of marketplace realities and on the basis of DARS’ proponents proffered format offerings, *how many niche program choices will actually be offered.*⁵

As NAB pointed out, an examination of the only proponents’ suggested formats available reveals that only the more popular (i.e., very large audiences) “niche” formats are to be programmed.⁶ For all the “promise” of niche and foreign language programming, the two

⁴ CD Radio Comments (filed September 15, 1995) at 48, 49, Appendix A at 24-27, CD Radio S-1, 12-DSS-MISC-94; Digital Satellite Broadcasting Corp. (DBSC) Comments at 18, 19; Primosphere Application at 4, filed December 15, 1992, File Nos. 29/30-DSS-LA-93.

⁵ NAB Comments at fns. 77 and 106 and accompanying text.

⁶ Id. The two DARS proponents’ proffered format listings indicate that only the more popular “niche” formats of Spanish-language music (one or two), classical (two or three), jazz (two), and even the more mainstream black/urban contemporary format (one or two) were to be provided. See format listings from Primosphere Application and CD Radio S-1, attached to NAB Comments as Attachment 10. Primosphere’s application does indicate that it will also provide “heritage formats” not typically formatted, such as Soul, Roots Rock and Folk, Bluegrass and Blues, as well as the panoply of mainstream formats and the “popular” niche formats listed just above. So, too, does CD Radio S-1 indicate that it “could” offer similar formats of folk rock, blues and even reggae, and the one “unusual” specialized formats of “Children’s Entertainment” and “World Beat.” Id. Additionally, Primosphere, in its initial

DARS applicants with proffered formats are suggesting *only one foreign language program offering, that of Spanish*,⁷ which is already widely available, in *local* form, terrestrially. There simply will be no Italian DARS channel, no Vietnamese DARS channel, no Arab channel, no Chinese channel⁸ -- unlike the current availability of *local* ethnic radio programming in areas with substantial ethnic populations.⁹

Individual broadcasters, relying on their substantial programming expertise, have suggested in their comments that DARS operators, given the unrestrained choice to program as the marketplace and their financial interests dictate, *will* opt for the more popular (and most remunerative) formats.¹⁰ The enormous numbers of people available as potential audiences for the more popular niche, and mainstream, formats simply dictate that result. So too, we might add, do the efficiencies to be offered to advertisers suggest that nationwide DARS would have competitive advantages to compete with incumbent broadcasters.

NAB is thus somewhat surprised to see CD Radio aver in their comments, albeit in a conclusory and un-backed-up statement, that business imperatives will lead them to program the *less* popular formats, that it would not be economically efficient to duplicate mass-market programs and that they could not survive in the radio market by replicating existing formats.¹¹

comments at 6, indicates that it will "donate" a music and a voice channel to public broadcasting and will dedicate a voice channel for a reading service and a music channel for children's programming. This is the closest a DARS applicant has come to an "actual" promise, rather than proffering the theoretical "promise" of DARS.

⁷ Id. See, e.g., NAB Comments, fn. 78 and accompanying text.

⁸ See, Festa Italiana Comments, Italian Industries Association Comments, Dialog and Confluence Comments (Vietnamese), Council for the National Interest Comments (Arab), New York Chinatown Senior Citizen Center, Inc. Comments.

⁹ See, NAB Comments, Attachment 12.

¹⁰ See, e.g., Comments of Bonneville International.

¹¹ See, CD Radio at 49, 50; DSBC at 30.

Certainly DARS operators will offer *some* of the more popular “niche” and specialized formats as inducements to consumers to subscribe and buy receivers, but they will be sure to reserve the majority of their channels for mainstream formats (even if some are split up into separate channels) and the more popular “niche” formats of classical music, urban contemporary and Spanish-language, as the two available suggested program listings indicate.¹²

It is telling to compare the foreign language program listing contained in CD Radio’s S-1 filing with the Securities and Exchange Commission (a filing known for its need to be accurate) with the “DARS *could* offer” foreign language channel *possibilities* contained in the InContext Study previously filed with the Commission and appended to CD Radio’s initial comments.¹³ CD Radio’s S-1 lists *one* foreign language channel, that of Spanish.¹⁴ The InContext Study sets out, in comparison to *full time* foreign language broadcast channels, DARS *possible* channels -- channels that are no more than pie-in-the-sky suggestions that just as likely *could* be on *any* broadcast channel.¹⁵ But that is not the picture the reader of CD Radio’s study has. The intended picture is that CD Radio *will* have a Chinese channel, a Greek channel, a Japanese channel, a Jewish channel, a Filipino channel, a Portuguese channel, a Korean channel, a Polish channel and an Italian channel.¹⁶ NAB submits that, unless the Commission were to *require* promises of foreign language channels, all DARS operators will

¹² See, NAB Comments, Attachment 10.

¹³ CD Radio S-1, *supra*; See Also, InContext Study, Attachment A of CD Radio Comments, *supra*.

¹⁴ See, NAB Comments, Attachment 10.

¹⁵ CD Radio Comments, Attachment A at 24-26.

¹⁶ Id.

provide in the way of foreign language *channels* is that of Spanish language, as was suggested to the SEC by CD Radio.

NAB thus replies to the many commenters supporting DARS because it *could* provide a channel for their foreign language or other specialized niche that DARS will not go much past the already well served Spanish language format in the way of foreign language channels, or other specialized niches -- unless of course the FCC requires them to do so.¹⁷

2. DARS Proponents Underepresent and Misrepresent Radio's Reach: The Reality Is Extensive Coverage.

Three of the DARS Proponents, in their comments,¹⁸ blatantly misrepresent the reach of terrestrial radio by referencing *only* the reach of FM radio signals, *completely ignoring the entire AM radio industry as though it did not exist*, when in fact AM radio has been the backbone of small market and *local* radio for over 70 years and represents nearly one-half of all commercial radio stations. Carrying their mischaracterizations farther, DSBC and CD Radio suggest that "many" rural areas receive "only a few" radio stations or are "unserved" by referencing the same study of *only FM signals* submitted by another applicant.¹⁹

¹⁷ As the Comments of the Media Access Project (at 12) puts it, "DARS operators promise the world, but they may deliver substantially less to the listening public if the Commission fails to impose public interest requirements upon them."

¹⁸ CD Radio Comments at 51 and Appendix A at 23 (no citation); DSBC at 17 (citing without page or attachment to Cohen Assoc. Exhibit 7 in Primosphere Statement, January 3, 1995); Primosphere Comments at 5 and Appendix B.

¹⁹ DBSC at *id.*; CD Radio at *id.* CD Radio, in fact, has *no citation at all* to its use of these FM-only numbers, nor does the InContext Study now or when it was originally submitted to the Commission. DBSC cites to nothing other than the author of this study, i.e., no date, where submitted, or other information.

As two of the DARS applicants, Primosphere and AMRC, have submitted an economic study (on which they base their assertions that DARS will have a “trivial” or “minimal” impact on terrestrial radio) which *considers only “rated” FM stations and calls them “typical,”*²⁰ and the other two applicants misrepresent the reach of radio by referencing only FM stations as just described, it becomes clear that *the DARS applicants are really focused not on the smaller stations*, but on the audience of the larger stations (FM), the larger populations, the real numbers and the real dollars.

What NAB has demonstrated is that it is terrestrial *local* radio that indeed focuses on and serves and reaches small market America, with both small *local* AM stations and with high-powered FM and with stations in between. NAB showed by a comprehensive study that *only .003% of the total age 12 and older population (6,100 people out of 210 million) live in counties that receive less than 6 radio signals.*²¹ NAB showed that *even the smallest counties, those with a 12 and older population of less than 1,000, receive, on average, nearly 15 signals.*²² In the next smallest counties, those with a 12 and older population of 1,000-10,000, an average 20.5 radio signals are receivable.²³ In counties with populations of only 50,000-100,000, an average of 46 stations are received.²⁴ In addition to the Listening Study,

²⁰ Comments of Primosphere and Comments of AMRC, at Appendix A, Malarkey-Taylor Associates, Inc.-EMC I (“MTA Study”).

²¹ NAB Comments at 17, 18 and Attachment 3.

²² Id.

²³ Id.

²⁴ Id.

NAB also submitted an analysis of the number of formats available, by market size, which demonstrated the similar wide diversity of formats available in all market sizes.²⁵

When one looks at the whole picture of radio service in the United States, not just at a selected portion of the radio industry as the DARS applicants have self-servingly done, it becomes clear that there is wide diversity, great numbers of *local* community-connected and people-connected radio stations in even the smaller markets that the “promise” of DARS somehow misses. DARS will add something to many radio markets. But not as much as the applicants would have the Commission (or many of the commenters) believe. The American people are well served by traditional radio, in the large markets, and importantly, in the small and medium markets that DARS “promises” to serve but will, in the long run, homogenize and strip of its connectedness and its sense of “community.”

3. DARS Will Not Bring Much Lasting Benefit In Terms of Jobs or U.S. Competitiveness, But Will Precipitate Significant Job Losses In Local Radio.

The DARS applicants claim that DARS will improve U.S. competitiveness and create jobs in the U.S.²⁶ NAB submits that DARS will not substantially affect U.S. competitiveness. One, there is not such a “fast emerging international market for satellite DARS.”²⁷ Rather, the U.S. is one of the only countries actually moving ahead with implementation of satellite DARS. Two, the satellite technology being employed by the DARS applicants is in fact not “new” technology that would increase U.S. competitiveness, but rather standard, run-of-the-

²⁵ NAB Comments, Attachment 4.

²⁶ CD Radio at 52, 53; DSBC at 21; Primosphere at 6.

²⁷ CD Radio at 53.

mill decade-old satellite transmission technology. (The most technologically sophisticated system being proposed, that of Cracken Barrel Old Country store Inc., which would potentially result in three times as many CD-quality channels in the 50 MHz DARS band as do the systems of the current applicants, is at this time not even being considered, and will continue to be over looked if the current applicants succeed in their attempt to disallow additional applications.) The Eureka 147 DAB system, on the other hand, is in fact the pioneer and leader in digital audio transmission and modulation technology and will remain so irrespective of the DARS applicants' implementation of their old technology. Three, U.S. technology will remain competitive to the extent that it is superior and cost-efficient for all users and buyers, not to the extent that U.S. companies employ it. Thus, the U.S. is and will remain the world leader in satellite design and construction, irrespective of whether DARS ever builds a U.S. satellite. The same obtains for U.S. prominence with regard to IC (integrated circuit) design and development. So too with regard to English-speaking programming and record distribution, the U.S. is and will remain a world leader and net exporter of English-speaking programming product. (What will in fact increase U.S. technological leadership is the IBOC terrestrial DAB technology that is currently being developed by and for U.S. broadcasters. NAB submits that terrestrial broadcasters the world over will employ IBOC technology).

NAB further submits that DARS will effect a net *loss* in U.S. jobs, and, even on its own, will not create much in term of long term employment. One, the bulk of the jobs that will be supported by DARS will be shorter term employment for the construction of DARS satellites. Other than satellite construction jobs, DARS will not be much of a people-intensive

business. It will for the most part buy pre-packaged product and will operate from a central headquarters without much of a labor force.

Two, DARS will, as NAB's initial comments indicated, precipitate competitive adaptations on the part of thousands of local radio stations that will be forced to cut staff.²⁸ DARS will wind up permanently eliminating thousands of U.S. jobs, many of which will be in smaller²⁹ and medium sized markets where local retailers have already experienced tremendous upheaval and downsizing and business closures.³⁰ Local economies will be affected.³¹ And DARS will not "give back" to those local communities which lose jobs and businesses.³² As Primosphere noted in its initial comments,³³ local radio has lost over ten thousand jobs in the last ten years. This has been a direct result of the extreme competition from both within and without the radio which has necessitated cutting expenses and jobs and consolidation of operations. Competition from satellite DARS will only extend and exacerbate this trend,³⁴ to a very great net loss in U.S. jobs. Again, DARS will not give back anything compared to what it will take away.

B. DARS Will Impact the Financial Abilities of Broadcasters To Provide Local Service, Particularly to the Smaller Markets and to Minority, Niche and Foreign Language Audiences.

²⁸ NAB Comments Attachment 1, SPR Study at 36-47, Economic Analysis.

²⁹ See, NAB Comments, supra. SPR Study at 46 and individual broadcaster comments in SPR Study at 15, 16 and 50 et seq. See also individual broadcasters' letters filed in this docket.

³⁰ NAB Comments, Attachment 1 SPR Study at 48-139, Case Studies.

³¹ Id.

³² Id.

³³ Primosphere Comments at 30.

³⁴ See Section I.C. below.

The DARS proponents have presented studies, arguments and an economic analysis that purport to “trivialize” any impact DARS would have on traditional radio. Their arguments and analyses, each and every one, are either disingenuous, specious, underinclusive or out and out misrepresentations of the radio industry. They would have the Commission believe that they will recoup and profit on their hundreds of millions of dollars (almost a billion dollars, as one applicants put it) of investment on the basis of totally new listening and new advertising, where the 95.5% of the public age 12 and older already listens to radio each week, an average of 3 hours 12 minutes each weekday, 20 hours 42 minutes each week and national advertisers can already reach these audiences through a functioning system of national spot advertising buys.³⁵ Their arguments are simply not credible and their analyses faulty and skewed.

1. The Commission Can and Should Consider the Impact Of DARS On Traditional Radio, On Localism and On the Public Interest.

Certain DARS applicants argue against the Commission’s considering economic harm to traditional radio from a new DARS service³⁶ and a concomitant negative impact on local service and the public interest, in that such impact is irrelevant, and on the bases of the Commission’s elimination of the Carroll doctrine³⁷ and of the Court of Appeals decision³⁸ in the DBS case. The Commission clearly *only* eliminated the Carroll doctrine and its inquiry

³⁵ “Radio Marketing Guide and Fact Book for Advertisers” Radio Advertising Bureau, 1995, at 3, 5.

³⁶ CD Radio at 57-63; DSBC at 25-29.

³⁷ “Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations,” 3 FCC Rod. 638 (1988), recon. 4 FCC Rod. 2276 (1989).

³⁸ National Association of Broadcasters v. FCC, 740 F.2d 1190 (1984).

into economic impact as to licensing and allotment proceedings, specifically preserving such an inquiry for policymaking and rulemaking proceedings.³⁹ And the DBS case clearly did not indicate that the FCC could not or should not consider economic impact to broadcasters and a resulting impact on local service in considering whether to authorize a new service. Rather, that court found that the FCC *had* conducted an inquiry into DBS' potential impact on television broadcasting and the public interest.⁴⁰ Thus there is *no* merit to the argument that as a matter of law or policy that the FCC should not inquire into the impact of a new service on local radio service and the public interest.⁴¹

Another DARS applicant states the Commission's inquiry more appropriately as considering the economic effect of a new service on existing licensees "if there is strong evidence that a significant net reduction in service to the public will result."⁴² NAB submits that it has presented "strong evidence" that a significant net reduction in service to the public will result from the implementation of DARS and that the DARS applicants have not defeated that showing with their incomplete and misleading analyses, with their self-serving and partial pictures of the radio industry and with their off the mark arguments.

2. Local Radio Is Highly Competitive and Localism and Local Radio Have In Fact Suffered From the Effects of Docket 80-90.

In detailing the competition, availability and diversity in local radio everywhere, NAB, in its initial comments, indicated that it is widely considered that the radio industry has been

³⁹ Detrimental Effects, *supra*, 4 FCC Rod. at 2277.

⁴⁰ NAB v. FCC, *supra* 1220, 1221.

⁴¹ See Comments of Media Access Project at 5-9.

⁴² Comments of Primosphere at 23, quoting the FCC order authorizing DBS.

“over-radioed” by Docket 80-90’s adding a tremendous number of stations and raising power limits.⁴³ The FCC in that proceeding added stations and increased power limits in order to extend the amount and extent of *local* radio service to all areas of the country -- to achieve the widespread and diverse *local* service that has been the goal of FCC policymaking for fifty years.⁴⁴

The effect, however, of the addition of a tremendous number of stations was, in the view of most observers and FCC officials,⁴⁵ deleterious. The adverse impact, on stations and on localism, of Docket 80-90 is well described in the comments of Susquehanna Radio Corp. and Noble Broadcast Group, as well as in the SPR Study submitted with NAB’s initial comments.⁴⁶ There occurred, even in the small markets, fierce competition, insufficient increases in market revenues to support the increases in numbers of stations, resulting decreases in profit margins, and ultimately the forced reductions in operating costs, notably in program costs and staff.⁴⁷ As Noble Broadcast Group’s comments describe it, many stations were unable to stay afloat and “the decade beginning with the adoption of Docket 80-90 saw an unprecedented number of broadcast bankruptcies and foreclosures.”⁴⁸

⁴³ NAB Comments at 18.

⁴⁴ “FM Broadcast Stations,” 94 FCC 2d 152 (1983).

⁴⁵ See NAB Comments at fn. 39.

⁴⁶ Comments of Susquehanna Radio Corp. at 2, 3; Comments of Noble Broadcast Group, Inc. at 2, 3 SPR Study at 45-47.

⁴⁷ See Comments of Noble Broadcast Group, Inc. at 2, 3; Comments of Susquehanna at 2, 3.

⁴⁸ Id. Noble points to NAB’s showing in the Kagan Study that the stations added between 1985 and 1993 in the 36 markets studied in that report caused average cash flow losses of approximately 50 percent in large and medium markets and 121 percent in small markets. Id.

As Noble Broadcast Group's comments and the NAB's initial comments and the SPR Study indicate, the decreased revenues brought about by Docket 80-90 stations caused stations to lay off staff, reduce expensive local programming⁴⁹ and increasingly rely on satellite-delivered programming. Thus, as Noble points out, the direct result of the FCC's efforts to expand the number of competing stations through Docket 80-90 was a decrease in localism.⁵⁰ Susquehanna says that

[c]ertainly, Docket 80-90 produced more services, but it would appear that most of these new services duplicated formats that existed on previously authorized stations, resulting in few new or alternative programming services. It would appear that the additional public service gains obtained by these new services have been to a great extent offset by the 'public interest' losses that are now being experienced by all stations, including those authorized by Docket 80-90, as a result of the overcrowding of the FM band.

Competition within the local radio market for both listeners and dollars is fierce and real. Unfortunately, many station in medium and small markets, in a hope to become profitable, have had to cut cost. These cuts greatly diminished the station's ability to serve the public interest. Many stations found it necessary to cut or curtail their commitment to local new and community affairs in order to remain on the air. These problems that exist today will be dwarfed by comparison to those that can be expected by the addition of DARS service.⁵¹

3. DARS Proponents Falsely Present and Analyze the Radio Industry As A FM-Only Well-Heeled Monolith.

⁴⁹ See also, as to the fact that local news and information programming is an expensive expense item, Comments of Entertainment Communications, Inc. (Entercom) at 6-9, Susquehanna Comments at 4; SPR Study at 44, 45.

⁵⁰ Noble Broadcast Comments at 3; cf. SPR Study at 45-46.

⁵¹ Susquehanna Comments at 2, 3. See also, for an exaggerated but nonetheless telling view of the effects on localism of "too much" radio, the Comments of Primosphere at 29, 30. See, then, as a counter to Primosphere's characterization, a description of the extraordinary extent and weight of localism in the SPR Study, at 8-18, 48 et seq. See particularly SPR Study, at 129-139 for a description of the extraordinary local service of a broadcaster forced to rely on satellite-delivered programming for much of the day.

The DARS proponents present and analyze the radio industry as an “economic powerhouse,” as CD Radio puts it,⁵² which can of course be portrayed as more than financially able to withstand more competition and audience and advertising diversion from DARS⁵³ than can the lower rated, more vulnerable and stand-alone stations and most all the stations in the truly small markets -- all of which the DARS proponents’ presentations neglect to include or acknowledge. The radio industry is in fact not the monolith the DARS proponents present.

CD Radio, in its comments and in its attached InContext Study and attached trade press and market analysts articles,⁵⁴ DSBC through its Darby Study,⁵⁵ and Primosphere and AMRC through their MTA Study,⁵⁶ all present a picture of a healthy, thriving radio industry which each describes and analyzes as having the financial strength and future prospects sufficient to accommodate the competitive challenges from DARS.

The problem is, however, that each of the proponents’ studies present only part of the picture of the financial state of “radio,” yet treat that “financially robust” part as the picture of the whole. The part of the radio industry that is depicted by and analyzed in the proponents’ studies is that part represented by FM stations⁵⁷ in the large and medium markets,⁵⁸ the

⁵² Comments of CD Radio at 64, InContext Study at 9-15.

⁵³ Id.; Comments of DSBC, Statement of Dr. Larry F. Darby at i.

⁵⁴ Comments of CD Radio at 64-72; at Attachment A, InContext Study at 9-15; at Attachment D.

⁵⁵ Darby Statement, supra, at i.

⁵⁶ Comments of Primosphere and Comments of AMRC, at Appendix A, Malarkey-Taylor Associates, Inc. - EMC I (“MTA Study”).

⁵⁷ MTA Study.

⁵⁸ MTA Study, Darby Statment.

publicly traded radio companies⁵⁹ (which are competitively and financially successful larger group owners), the rated stations⁶⁰ in rated markets⁶¹ and industry “averages”⁶² (which mask the wide disparities within the industry as a whole⁶³).

Thus, discussion of publicly traded radio equities⁶⁴ and “Wall Street bullishness”⁶⁵ and of Veronis, Suhler & Associates statistics and analysis⁶⁶ (which focuses on publicly-traded companies) references only the strong and healthy “big” side of the radio industry. Further, the high volume and trading multiples of radio station sales⁶⁷ itself is as much a reflection of the potential efficiencies of consolidation in local radio markets and of the FCC rules so allowing as it is of the financial strength of the “strong” part of the radio industry.

Even discussion of radio station sales revenues, cash flow margins and advertising revenue “averages” mask the wide disparities within the industry.⁶⁸ The InContext Study, for example, relies in part on aggregated, industrywide statistics misleadingly stated in nominal terms (i.e., not corrected for price inflation) and presented on an aggregate basis.⁶⁹ When this type of data is corrected for inflation and adjusted to reflect the very large increases in

⁵⁹ CD Radio at 65, 66; Darby at 5, 22.

⁶⁰ MTA Study at 5, 6.

⁶¹ Id.

⁶² MTA Study, Darby Statement, InContext Study.

⁶³ See SPR Study at 40, 41.

⁶⁴ See Darby Statement at 5. Dr. Darby “corroborates” the forecasted growth of radio revenues by citing an article that “revenues the financial performance of the principal publicly-traded radio stocks for the first half of 1995.” Id. ; CD Radio at 68, Appendix D.

⁶⁵ CD Radio at Id.

⁶⁶ Id. at 70; Darby Statement at 3-5, 9-11.

⁶⁷ CD Radio at 64; Darby Statement at 14, 15; InContext at 12.

⁶⁸ See SPR Study at 41-43.

⁶⁹ InContext Study at 14.